MAY 28 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 962, 980.

MARTIN M. GOLDMAN and THEODORE GOLDMAN,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS.

MARTIN M. GOLDMAN and
THEODORE GOLDMAN,
Petitioners,
by JACOB W. FRIEDMAN,
Attorney for Petitioners.

MARK SERVICE, BARCLAY 7-2180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

MARTIN M. GOLDMAN and THEODORE GOLDMAN, Petitioners, against UNITED STATES OF AMERICA, Respondent.	Nos. 962, 980.

REPLY BRIEF ON BEHALF OF PETITIONERS.

I.

There are more than three questions presented for review.

Respondent's brief may give the impression (p. 2) that the only questions raised are the three there indicated. A reference to petitioners' original brief (p. 14) shows that in addition to the five errors there specifically treated, petitioners declared their intention "to urge all the errors assigned (3154-3194)." In the interests of brevity these were not elaborated in the petition or brief, but they are actually important and substantial. Upon the granting of full review by this Court all of those errors will be presented and briefed.

II.

The illegal trespass directly aided the installation and utilization of the detectaphone device.

Respondent admits (p. 5) that "Turner, who had been in Shulman's office the previous night, described its ar-

rangement to Schroeder." Schroeder was the technician who supervised the installation of the detectaphone, while Turner was the agent who had concededly gained illegal access to Shulman's office the night before. Respondent admits further (footnote, p. 8) "that agent Turner * * * described the layout of the office to him [Schroeder] and that this helped somewhat in selecting a location for the detectaphone."

Here we have the clear and unequivocal concession by the prosecution that the trespass and consequent invasion of Shulman's constitutional rights aided the agents in their subsequent employment of the detectaphone. Regardless of the attempted argument that the location of the detectaphone was also facilitated by a process of trial and error, the conclusion is inescapable that the instrumentality of overhearing was attended with the initial vice of a trespass. To argue that Schroeder, in ascertaining the most suitable point for the affixation of the detectaphone, contrived to rid his mind of the data imparted by Turner, is to advance a sheer absurdity and to impute to him a superhuman ability to banish from his recollection information that was necessarily advantageous in accomplishing the task in hand. Respondent's strained argument in this connection is completely refuted by the circumstance that Turner was then imparting the information to Schroeder for the express purpose of assisting the placing of the detectaphone, and Schroeder could scarcely have been fashioning his conduct to conform to an anticipated attack upon its constitutional propriety.

Moreover, it appears from Petitioners' Exhibit 1 (2854-2859), the floor plan of Shulman's suite, that the suite consisted of three rooms, only two of which abutted on Room 1508 (where the detectaphone had to be installed) and even those two rooms were divided by a wall. Therefore, the inevitable consequence of the trespass was to reveal and make available to the government agents at

least three indispensable facts: (1) that Shulman's private office was one of the two rooms that had a wall in common with Room 1508, which in consequence was the right location for the installation of a detectaphone; (2) that the half of Room 1508 which was nearer to the window was the portion directly adjoining Shulman's office; and (3) finally, that the spot where the "trial and error" method should have its genesis was the area on the wall nearest to the window and directly in line with Shulman's desk on the other side. When the trial and error factor is scrutinized, it becomes rather apparent that the process in which the respondent now takes refuge consisted in the main of moving the detectaphone about in a minute area for the purpose of eliminating distinctly local interference such as a beam or dead spot.

III.

The case is not governed by the authorities dealing with searchlights or eavesdropping.

Respondent urges (p. 8) that the situation herein is to be assimilated to those where the use of a searchilght or field glasses or eavesdropping has been held not to affect the admissibility of evidence obtained thereby. It is submitted that none of the means indicated is comparable to a detectaphone enabling the users scientifically to project their auditory faculties through a wall and into the privacy of a conversation in a closed room. The Circuit Court's analogy that this was a mere use of a mechanical aid to the human senses is fallacious in that no person standing outside could normally hear the room conversation any more than he could read a letter on the desk. If he equipped himself with a scientific device that enabled him to accomplish either of these things, he would be just as effectively invading the privacy of the room as

if he had crossed the threshold. Neither a searchlight nor a field glass—nor, for that matter, the "use of a common aid to hearing by a person somewhat deaf" (opinion of Circuit Court of Appeals)—does more than can be effected by a person looking through a window at close range or, in the other case, by a person standing in the immediate vicinity of the speaker. A man's actions and words are always exposed to the possibility that they may be observed or overheard through the employment of the normal faculties of persons to whom they are not directed—which faculties may in some instances be rendered effective by common everyday aids to vision and hearing. The risk is controlled by the construction of his curtilage—such as the choice of doors, windows, thickness of walls and other safeguards of privacy. When one is heedless of his right of privacy it is to be expected that open doors, walls penetrable by the human voice, uncovered windows, field glasses, telescopes, aids to deaf persons, or flashlights, may be utilized. But who can possibly contemplate or anticipate that the insignificant vibrations of a wall occasioned by an ordinary conversation within the privacy of one's own home will be scientifically seized from without, drawn through the wall and converted into electrical impulses that in turn are transformed by an electric amplifier into their original spoken form and tenor? Even a stone wall presents no barrier to the efficacy of a detectaphone (285):

> "Q. * * * Can you take that through a stone wall? A. It is possible, yes."

Directly apposite is the carefully reasoned holding of the New York Court of Appeals in *Forbell* v. *City of New York*, 164 N. Y. 522, that "trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated." That being the law, it follows that the acts of the agents

were an unmistakable trespass and that all of the sequelae must be judicially condemned.

IV.

These petitioners are entitled to the benefit of the constitutional immunity vouchsafed to the petitioner Shulman.

Respondent doubts (p. 11) that the Goldmans are in a position to question the evidence obtained by overhearing conversations in Shulman's private office. It is also stated that "such portions of Martin Goldman's conversations as were overheard tended to support his defense rather than to incriminate him." So they did. However, that circumstance does not entitle the prosecution to avail itself of any damaging inferences that might be drawn from the overheard conversations of Shulman. Respondent suggests that the legality of a search can be questioned only by the owner or lawful tenant of the premises involved. None of the cases cited are applicable to the instant situation, for here the objection is likewise made by Shulman himself. Once he raises the point, all defendants are entitled to its benefit. That is the necessary effect of the holding of this Court in *Weiss* v. *United States*, 308 U. S. 321, where a judgment of conviction was reversed as to one Goldstein because of the improper reception in evidence of intercepted telephone conversations, notwithstanding the fact that he was not a party to a single one of those conversations. As the Circuit Court of Appeals in the same case observed, 103 F. 2d 348 (and on this point the opinion was manifestly approved by the Supreme Court of the United States):

> "Such evidence weighed against Goldstein and his conviction ought not to stand if the communications implicating the others were improperly received."

The same discussion and authority apply with equal force in refutation of the similar argument made by respondent at p. 12, footnote 4, regarding intercepted telephone conversations to which the Goldmans were not parties.

Surely, if Shulman may claim immunity with respect to his statements uttered in the absence of the Goldmans, all the more should the Goldmans be afforded that same beneficent protection when they were powerless to disavow such utterances.

V.

The illegal interception and divulgence of telephone communications are available to these petitioners.

In this connection the Court is respectfully referred to our argument under Section IV, above.

VI.

There was an interception of telephone communications.

In its effort to avoid the controlling effect of Section 605 of the Federal Communications Act, respondent resorts to a refinement of argument that completely ignores the unmistakable import of the statute. No reasoning can detract from the inexorable fact that Shulman was speaking on the telephone and that his words constituted a telephone communication in the course of transmission when it was intercepted. It is not necessary to constitute a violation that the words of both parties to a conversation be overheard. Indeed, the statute does not use the word "conversation" at all, but refers only to "communications." There can be no doubt that what one person says over a telephone to another is a communication in the full sense of the words.

VII.

The withheld memoranda were not privileged official communications.

Respondent argues (pp. 7, 14) that the trial court denied petitioners the right to inspect documents used to refresh the recollections of government witnesses on the ground that they were privileged official communications. In this contention respondent is clearly in error. A careful reading of the transcript (1412, 1415-1416, 1446-1453) demonstrates that both objection of respondent and the ruling of the trial court denying the inspection were predicated exclusively upon the ground that the documents were not actually used by the witnesses while testifying. The question of privileged official communications was never raised by the prosecution (1446).

Conclusion.

For the foregoing reasons, as well as those specified in the petitions and main brief, it is respectfully submitted that the petitions should be granted.

May , 1941.

MARTIN M. GOLDMAN and
THEODORE GOLDMAN,
Petitioners,
by JACOB W. FRIEDMAN,
Attorney for Petitioners.